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No. 95-2074

In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, and UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT FLORES

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. §2000bb to 2000bb-4 (1994), is a facially valid exercise of Congressional power to enforce the Fourteenth Amendment.

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STATEMENT OF THE CASE

1. The Underlying Dispute. This case involves the right of a religious community to worship together, and the right of excluded individuals to attend the Roman Catholic Mass, in St. Peter Church in Boerne, Texas. The Church's existing building was built in 1923 and is now far too small to seat the parishioners who wish to attend Mass on Sunday morning. Jt. App. 9-10 ¶25; *id.* at 68 ¶o. The pastor's undisputed affidavit states that St. Peter can seat only 230 worshipers at a time, and that 40 to 60 more than that regularly attempt to attend 11:00 Mass on Sunday. R.255-56. Total membership is 2,170 and growing. *Id.* The record does not indicate how many worshipers are turned away at Christmas and Easter, or how many have given up trying to attend on Sunday morning. The City has refused every request for a permit to enlarge the church building to make it adequate to the parish's needs. Jt. App. 68-70 ¶¶v, y, cc. The record does not reflect the fact, but after the adverse ruling in the trial court, the Church began celebrating Mass in an ill-suited secular auditorium.

The church building's front facade is located within the historic district authorized by Ord. 91-05 and created by Ord. 91-15 of the City of Boerne. *Id.* at 6 ¶11; *id.* at 68 ¶s. The Church had relied in two ways on the stated boundaries of the historic district as originally proposed: it did not oppose inclusion of the front facade, and it designed a new church building that would preserve the front facade. *Id.* at 7 ¶12. But the City refused a permit for the new building, stating that it would not approve any plan that required demolition of any part of the church building either inside or outside the boundaries of the district. Well after this lawsuit was filed, the City amended the boundaries of the historic district to include the entire church building. Ord. 94-17.

The church building is *not* an historical landmark, Jt. App. 7 ¶12; *id.* at 68 ¶t, and in fact is merely a modern imitation of a Spanish mission. The City describes this as "mission revival." City Br. 2. But the City says that it uses the word "historical" in a way that might "fool" its citizens, and that even buildings from the 1950s should be preserved. Jt. App. 28. Within the district, the City regulates every detail of a building's appearance. *Id.* at 31-32.

Most important, the building cannot be replaced or expanded,

even though it has become wholly inadequate for its longstanding and constitutionally protected use. The City would apparently permit the Church to build a second place of worship nearby, provided that it perpetually maintains the old church building as a sort of architectural museum. The existing site is hilly, and the Church's architect has estimated the extra cost of construction elsewhere on that site at $500,000. Jt. App. 42. The City's architect disputes that figure, based on the counterfactual assumption that "topography and soil conditions are the same throughout the site." *Id.* at 43-44.

2. The Litigation. The litigation is accurately summarized in the briefs of the City and the United States. We would add two points. First, because the RFRA claim was dismissed as a matter of law, the allegations of the complaint are to be taken as true. Second, there are pending in the District Court state and federal constitutional claims not at issue here, including claims under the Free Exercise Clause and the Takings Clause. Jt. App. 13-21.

3. The Statute. The Religious Freedom Restoration Act passed the House of Representatives unanimously, 139 Cong. Rec. H8713-15 (Nov. 3, 1993), and the Senate by 97-3, *id.* at S14470-71 (Oct. 27, 1993). RFRA creates a statutory right to the free exercise of religion. 42 U.S.C. §2000bb-1(b) (1994). This *statutory* right is in aid of the narrower *constitutional* right to the free exercise of religion. Under *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Constitution permits neutral and generally applicable laws to be applied in ways that suppress religious practices; government need not justify such burdens on religion. *Id.* at 885. But burdens that are not neutral and generally applicable must be justified by a compelling interest. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-40, 546-47 (1993); *Smith*, 494 U.S. at 877-79.

Under RFRA, the compelling interest test applies to any substantial burden on religious exercise, "even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a) (1994). The religious claimant need not prove deliberate or overt discrimination. Thus, the essential difference between the constitutional and statutory standards is in the threshold showing required to shift the burden of justification to the government. It is a variation on the familiar difference between intention and

effect. Any substantial burden on religion requires justification under RFRA; only deliberate or overt discrimination, including burdens that apply to religion but do not apply generally, requires justification under the Constitution.[1]

The only issue in this Court is the facial validity of the Act as applied to state and local governments. Every appellate court to reach the issue has upheld the Act as a valid exercise of Congressional power to enforce the Fourteenth Amendment.[2] As applied to federal law, RFRA has been upheld as a necessary and proper act to define the reach of other federal legislation. *EEOC v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996)

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[1] The legislative history repeatedly cites burdensome land use regulation as examples of why the bill was necessary. S. Rep. No. 103-111 at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897; H.R. Rep. No. 103-88 at 6 n.14 (1993); *Hearings on H.R. 2797* (Serial No. 102-99) at 122 (1992) (Rep. Solarz); 139 Cong. Rec. S14353 (Oct. 26, 1993) (Sen. Hatch). Churches are landmarked at rates grossly disproportionate to secular properties. N.J. L'Heureux, Jr., *Ministry v. Mortar: A Landmark Conflict*, in Dean M. Kelley, ed., *Government Intervention in Religious Affairs 2* at 164, 168 (1986); *see* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401 (1991).

[2] *Flores v. City of Boerne*, Pet. App. 1a (Higginbotham, J.), *reh'g en banc denied without a poll of judges*, *id.* at 30a; *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996) (Posner, J.), *cert. pending*, No. 96-710; *State v. Miller*, 538 N.W.2d 573, 577 (Wis. App. 1995), *aff'd on other grounds*, 549 N.W.2d 235 (Wis. 1996) (upholding the religious liberty claim under the state constitution); *South Jersey Catholic School Teachers Ass'n v. St. Teresa Elem. School*, 675 A.2d 1155, 1167 (N.J. Super. App. Div.), *certification granted on other grounds*, 683 A.2d 1162 (N.J. 1996). For commentary supporting the validity of RFRA, see Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73, 90-95; Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181, 187-90 (1992); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996); Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029, 1053-85, 1095-99 (1993); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 62-68 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 245-54; Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145, 152-69 (1995).

(Buckley, J). The validity of RFRA as applied to federal law is not at issue in this case.

SUMMARY OF ARGUMENT

With respect to state and local governments, Congressional power to enact RFRA is found in §5 of the Fourteenth Amendment, which authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." A long and unbroken line of cases in this Court holds that Congressional power to enforce constitutional amendments includes power to enact prophylactic rules that go beyond what the judiciary would enjoin on its own interpretation of the amendment.

The most familiar exercises of this power are the various Voting Rights Acts, which bar electoral practices with discriminatory results, and the 1972 Amendments to Title VII, which require state and local governments to justify employment practices with discriminatory effects. These laws are directly analogous to RFRA, because each created a statutory right protected against burdensome or discriminatory effects, supplementing a constitutional right protected only against deliberate or overt discrimination. This Court relied on this doctrinal structure in *Smith*, holding that the Constitution protects against religious classifications but not against laws with burdensome religious effects. 494 U.S. at 886 n.3.

The City first argues that Congress has no power to go beyond judicial interpretation of the Amendment. Then it concedes that that position is inconsistent with precedent, but it insists that RFRA is somehow uniquely different from all prior legislation enforcing constitutional amendments. It cannot explain how RFRA is unique, because dispensing with proof of deliberate or overt discrimination is the most familiar use of the enforcement power. The City's theory of remedial and substantive uses of the enforcement power does not accurately describe the cases; if Title VII and the Voting Rights Acts were remedial, then so is RFRA. The City's theory also errs by assuming that if any one substantive use of §5 is permitted, then any imaginable substantive use of §5 must be permitted. Undoubtedly there are limits to §5 power, but RFRA does not approach those limits.

Congress made ample findings to support RFRA. Congress

found that neutral laws burden religion, sometimes deliberately, that governmental motives are difficult to prove, and that specific exemptions in every statute are unworkable.

Section 5 power has most commonly been used to enforce the Equal Protection Clause. But this power is equally "plenary" when invoked to enforce the Due Process Clause and the incorporated rights contained in that clause. *Hutto v. Finney*, 437 U.S. 678, 693, 698-99 n.31 (1978).

The original understanding of the enforcement power is evidenced by the enforcement legislation enacted by the Congresses that proposed the Reconstruction Amendments. The laws that they enacted, and their debates on those laws, plainly show an understanding that the enforcement power was not confined to judicial interpretation of the amendments.

The enforcement power does not interfere with this Court's power to interpret the Constitution. *Smith* remains the law of the Constitution; Congress has created a separate statutory protection.

RFRA raises no serious issue under the Establishment Clause. The City's argument does not even cite this Court's unanimous decision upholding laws that exempt religious practices from burdensome regulation. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The City confuses the protection of religious liberty with the promotion of religion.

Liberty is most secure when all three branches have independent power to protect it; this is why Congress can expand but not contract the scope of Fourteenth Amendment liberties. By creating judicially enforceable statutory rights, Congress can call on powers of the judiciary that this Court was unwilling to invoke on its own. The resulting collaboration between the branches provides a stronger protection for liberty than either branch could provide alone. This is separation of powers at its best.

ARGUMENT

I. Congress Considered RFRA's Constitutionality, and Its Judgment Is Entitled to Reasonable Deference.

The issue is whether an Act of Congress is unconstitutional on its face. The Act is entitled to a "strong presumptive validity," *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32

(1963), and should be struck down only "for the most compelling constitutional reasons," *Mistretta v. United States*, 488 U.S. 361, 384 (1989), when there is "no room for reasonable doubt." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1872). In a "facial challenge," "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Deference is especially "appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Hearings in both Houses invited testimony pro and con on the constitutionality of the bill. *Hearing on S.2969* (Serial No. J-102-82) at 66, 92-97, 116, 122-25, 129, 172 (1992); *Hearing on H.R. 5377* (Serial No. 101-150) at 51, 54, 56, 72-79 (1990); *1992 House Hearings*, *supra* note 1, at 353-59, 373-74, 385-94, 397-99. The Congressional Research Service advised that Congress had power to enact RFRA under the Fourteenth Amendment with respect to the states and under the Necessary and Proper Clause with respect to the federal government. David M. Ackerman, *CRS Report for Congress: The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis* 30-31 (Cong. Research Serv. Doc. 92-366A) (1992). Both Judiciary Committees considered the constitutional question and concluded that Congress had ample power. *See* S. Rep., *supra* note 1, at 13-14, 1993 U.S.C.C.A.N. at 1903; H.R. Rep., *supra* note 1, at 9. Senator Hatch, the lead Republican sponsor, explained the constitutional issue to the Senate. 139 Cong. Rec. S14470 (Oct. 27, 1993).

In short, RFRA represents the considered constitutional judgment of an equal and coordinate branch of government. It is presumed to be constitutional, and the burden is on the City to show that it is not.

II. RFRA Is a Valid Exercise of Congressional Power to Enforce the Fourteenth Amendment.

A. The Enforcement Power Is Not Confined to Judicial Interpretation of the Amendment to Be Enforced.

RFRA is a valid exercise of Congressional power to enforce the Fourteenth Amendment. That Amendment provides in §5: "The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article." Among the provisions of that article is §1, which provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." It is settled that the liberty protected by this Clause includes the free exercise of religion. *Smith*, 494 U.S. at 876-77; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); see *infra* 36.

For more than a century, this Court has said that the Enforcement Clauses are as broad as the Necessary and Proper Clause. *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980) (Burger, C.J., White & Powell, JJ. (plurality)); *City of Rome v. United States*, 446 U.S. 156, 175 (1980). "Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents." *Civil Rights Cases*, 109 U.S. 3, 21 (1883) (discussing the Enforcement Clause of the Thirteenth Amendment). "[W]hatever tends to enforce submission" is within the enforcement power, unless forbidden by some other constitutional provision. *Ex parte Virginia*, 100 U.S. 339, 346 (1879). The power is "plenary within the terms of the constitutional grant." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Hutto v. Finney*, 437 U.S. 678, 698-99 n.31 (1978).

The power "to enforce, by appropriate legislation" is independent of the power to adjudicate. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966). Rather, "[t]he power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J., Rehnquist, C.J., & White, J. (plurality)).

The standard of review is the broad rationality standard of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421, quoted and applied to the enforcement power in *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). *Accord*, *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924); *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).

B. RFRA Adds Statutory Protection Against Burdensome Effects to Constitutional Protection Against Deliberate or Overt Discrimination.

What RFRA adds to constitutional protection for the exercise of religion is protection triggered by burden or effects. Government must justify substantial burdens on religious exercise; victims need not prove that the burden resulted from bad motive, overt discrimination, or a departure from neutral and generally applicable lawmaking. RFRA is thus parallel to several of the most familiar exercises of the enforcement power. Both the Voting Rights Acts and the employment discrimination laws add protections triggered by results or effects to protection triggered by overt discrimination or discriminatory intent. *See infra* 11-16. RFRA does the same.

It was this Court that first relied on the structural similarity between religious burdens and racial impacts:

> Just as we subject to the most exacting scrutiny laws that make classifications based on race, . . . so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington v. Davis*, 426 U.S. 229 (1976) . . . Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

Smith, 494 U.S. at 886 n.3 (most citations omitted).

This comparison is dispositive of Congressional power to enact RFRA. For although the Constitution does not require

heightened scrutiny of practices with disproportionate racial impact, Congress has entirely banned voting practices that produce discriminatory results, 42 U.S.C. §1973 (1994), and it has required the states to prove both "job related[ness]" and "business necessity" to justify employment practices with disproportionate effects, 42 U.S.C. §§2000e-2(a)(2) and 2000e-2(k) (1994). Similarly here, Congress can require states to justify practices "that have the effect of burdening a particular religious practice." *Smith*, 494 U.S. at 886 n.3. Indeed, this "is the only approach compatible with these precedents." *Id.*

Of course the statutory and constitutional versions of these rights vary in response to the nature of each underlying right and the range of circumstances in which claims can arise. Discriminatory results in the voting cases are not exactly the same as disparate impact in the employment cases, and a burden on a substantive right such as religious liberty is not exactly the same as a statistically disparate impact on a group entitled to equality. But whether the standard is burden, impact, effects, or results, the focus is on the bearers of the protected right and how they are affected by the law, not on the state's classification scheme, its motive, intent, or purpose, or other details of state behavior.

On the constitutional side of the comparison, this Court has implemented the ban on religious classifications with the requirement of neutral and generally applicable law. Laws that regulate only a few people are not generally applicable. Laws that exempt cases of secular hardship, or that require government to assess the reasons for regulated conduct, are not neutral and generally applicable. *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884. The inquiry into neutrality is not confined to the face of the challenged law, but includes comparisons with other laws that regulate or fail to regulate analogous conduct. *See Lukumi*, 508 U.S. at 537, 539, 543-45.

As with racial or sexual classifications, a jurisdiction's laws may discriminate against religion in one of these forbidden ways without there having been conscious governmental hostility to religion. *See Lukumi*, 508 U.S. at 559 ("special burdens" on religion are invalid even if the "legislature consists entirely of the purehearted") (Scalia, J., concurring); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) ("regardless of purported motivation,"

racial classifications require "extraordinary justification"). A law may discriminate against religion without a finding of bad motive even if the law does not mention religion, if, for example, the law provides exemptions for secular hardship and no exemptions for religious exercise. *See Sherbert v. Verner*, 374 U.S. 398 (1963), as explained in *Smith*, 494 U.S. at 884; *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 883-87 (D. Md. 1996) (invalidating, under *Smith*, an historic-district ordinance that was applied to a monastery and chapel but created exemptions for various secular interests).

These varied forms of discrimination reflect differences in the facts of cases and in the range of ways in which government can discriminate against religion. These variations do not affect the basic point: with respect to race, sex, and religion, the Constitution requires special justification for deliberate discrimination or for discriminatory classifications that appear on the face of the law. And with respect to race, sex, and religion, Congress can reduce the threshold showing required to shift the burden of justification, requiring the states to justify laws that have the effect of burdening a religious practice or a racial or sexual group. The constitutional standard may require justification of more cases in the religion context than in the race context -- "neutral and generally applicable law" versus "racial classification" simpliciter. But that difference merely reduces the gap between constitutional and statutory protection, making RFRA an easier case than Title VII or the Voting Rights Acts.

C. Congress Has Well-Settled Power to Dispense with Proof of Deliberate or Overt Discrimination.

Unable to argue from existing law, the City relies principally on dissents. There are a remarkable twenty-nine citations to dissenting opinions in the City's brief, most of them for key points. City Br. 11, 16, 22-24, 26-27, 36, 38-42, 45-46. If this Court were to accept either of the City's positions, the entire body of law on Congressional enforcement power would be called into question, and much of it would have to be overruled.

The City initially argues that §5 confers no power to go beyond judicial interpretation of §1, City Br. 26-28, 30-31. But that claim is plainly untenable, and eventually the City concedes

that "Congress has been permitted to enact prophylactic legislation that bans actions not forbidden by the Constitution for the purpose of enforcing constitutional guarantees." *Id.* at 33. But the City claims that RFRA is somehow different from all previous prophylactic legislation to enforce constitutional amendments.

The distinctions offered are conclusory and untenable: that RFRA is substantive and all previous enforcement acts were remedial, *id.* at 32-42, that all previous enforcement acts were specific and only RFRA enacts a general standard, *id.* at 25, 29-30 32, 47, that earlier enforcement acts were supported by Congressional factfinding but RFRA is not, *id.* at 35-38, that only RFRA responded to a decision of this Court, *id.* at 28-30. The City never defines the terms used in these distinctions -- substantive, remedial, general, specific, standard -- and these terms do not describe RFRA in any way that is not equally descriptive of much other legislation under the Enforcement Clauses. We begin with a review of this past legislation.

1. Prior Enforcement Legislation.

Vast portions of our law are based on Congressional power to enforce constitutional rights beyond what this Court is prepared to adjudge unconstitutional on its own. The following list is not exhaustive, but it illustrates the radical legal change that would follow from the City's arguments.

a. The Voting Rights Acts.

The principal technique of the Voting Rights Acts is to dispense with proof of deliberate or overt discrimination. These Acts are therefore direct precedent for RFRA.

1. The core provisions of the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.* (1970), created statutory rights to enforce the Fifteenth Amendment that went far beyond this Court's interpretation of the Amendment. The Act banned literacy tests for voting in most southern states, required federal approval for all new voting rules in those states, and authorized federal examiners to register state voters. The Court upheld these provisions in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and again upheld the ban on literacy tests in *Gaston County v. United States*, 395 U.S. 285 (1969). The Court upheld a facial ban on literacy

tests even though it had recently rejected the claim that literacy tests for voting were facially unconstitutional. *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45 (1959).

2. Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. §1973b(e) (1994), forbad English language literacy tests for voters who had graduated from an American flag school taught in a language other than English. This too required a different result from the constitutional result under *Lassiter*. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld the provision as a law to enforce the Fourteenth Amendment.

3. Section 201 of the Voting Rights Act Amendments of 1970, 42 U.S.C. §1973aa (1994), banned literacy tests nationwide. The Court unanimously upheld this provision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), despite the lack of evidence that literacy tests had been misused in the newly covered states. *See id.* at 131-34 (Black, J.) (upholding nationwide ban on literacy tests without proof of discriminatory purpose); *id.* at 144-47 (Douglas, J.) (same, noting that Congress "need not make findings as to the incidence of literacy" (*id.* at 147)); *id.* at 216-17 (Harlan, J.) (same, relying on power to enforce the Fifteenth Amendment, "[d]espite the lack of evidence of specific instances of discriminatory application or effect" (*id.* at 216)); *id.* at 231-36 (Brennan, White, & Marshall, JJ.) (same, relying on power to ban practices with discriminatory effects); *id.* at 282-84 (Stewart, J., Burger, C.J. & Blackmun, J.) (same, joining Justice Black's opinion on this issue). *See Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (noting that in *Mitchell*, "[t]he Court was unanimous, albeit in separate opinions," in holding that Congress could prohibit voting tests with "discriminatory effects only") (Burger, C.J., Powell & White, JJ. (plurality)). This unanimity was reported in separate opinions because of disagreement about a more difficult issue, Congressional power to reduce the voting age. *See infra* 24.

4. Section 202 of the Voting Rights Act Amendments of 1970, 42 U.S.C. §1973aa-1 (1994), limited state residency requirements for voting in Presidential elections. The Court upheld this provision as appropriate legislation to enforce the implicit constitutional right to interstate migration. *Mitchell*, 400 U.S. at 236-39 (Brennan, White, & Marshall, JJ.); *id.* at 285-92

(Stewart, J., Burger, C.J., & Blackmun, J.); *id.* at 147-50 (Douglas, J.) (appropriate legislation to enforce the right to vote). This result is constitutionally required under subsequent decisions, *Dunn v. Blumstein*, 405 U.S. 330 (1972), but in *Mitchell*, the Court upheld §202 on the basis of Congressional authority without deciding whether the Constitution required the same result.

5. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (1994), required most southern states to submit alterations of electoral practices with potentially discriminatory effects to the Department of Justice for pre-implementation review. The Court upheld this provision in *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980), as an appropriate means to enforce the Fifteenth Amendment, even though it held the same day that electoral practices with discriminatory effects do *not* violate the Constitution without proof of discriminatory intent, *City of Mobile v. Bolden*, 446 U.S. 55, 62-64 (1980).

6. The 1982 Amendments to §2 of the Voting Rights Act, 42 U.S.C. §1973 (1994), barred, nationwide, existing voting systems with discriminatory results. These amendments were "largely a response" to the Court's decision in *Bolden*. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Like RFRA, these Amendments enacted a broad standard drawn from prior constitutional interpretation, and that standard does not depend on the intent of those who designed the challenged electoral system. This Court upheld these Amendments, summarily but with concurring and dissenting opinions. *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984); *see Bush v. Vera*, 116 S.Ct. 1941, 1968-69 (1996) (O'Connor, J., concurring).

b. The Civil Rights Act of 1964 and Amendments.

Many provisions of the Civil Rights Act of 1964 go beyond this Court's interpretation of the Constitution. As applied to state and local governments, all of these provisions depend on the 1972 Amendments, which extended Title VII to government employment. The City hinted below that these provisions might be explained away as Commerce Clause acts, but that position is untenable. Congress expressly rested the extension of Title VII to state and local employment on §5, and this Court upheld the extension based on §5. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453

n.9 (1976) (citing committee reports). *Fitzpatrick* and most of the other key cases interpreting and sustaining these Acts were decided between 1976 and 1985, when the Commerce Clause was unavailable to sustain the legislation. *Compare National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding state labor relations beyond reach of the Commerce Clause), with *Garcia v. San Antonio Met. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Usery*). This Court's continuing debate over *Usery* and *Garcia* makes the Commerce Clause theory as unreliable as it is ahistorical, and in any event, back pay, damages, and attorneys' fees would be unavailable to state employees if the legislation were based on the Commerce Clause. *See Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1128 (1996) (§5 does, but Commerce Clause does not, confer power to override Eleventh Amendment immunity).

Most important, it would turn federalism on its head to hold that Congress has more power to regulate the states under the Commerce Clause than under the Fourteenth Amendment. The foundation of this Court's federalism decisions is that Article I authorizes Congress "to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). But the Fourteenth Amendment is exactly the opposite; it is directed at states, and reaches individuals only derivatively. As then-Justice Rehnquist wrote for the Court:

> When Congress acts pursuant to § 5, not only is it exercising authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Fitzpatrick, 427 U.S. at 456.

Some Title VII provisions dispense with proof of deliberate or overt discrimination. Others expand the definition of discrimination, or balance interests in ways different from how this Court balanced the same interests for constitutional purposes. (We number continuously from the list of Voting Rights Acts.)

7. The disparate impact provisions of Title VII, 42 U.S.C. §2000e-2(a)(2) and 2000e-2(k) (1994). The Constitution forbids only deliberate or overt discrimination in employment.

Washington v. Davis, 426 U.S. 229, 238-48 (1976). But Title VII requires employers to justify practices with disparate impact on women or minorities by showing "job related[ness]" and "business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i) (1994); *Connecticut v. Teal*, 457 U.S. 440, 445-51 (1982). Like RFRA, these provisions enact a broad standard to be applied to individual cases.

8. The Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (1994). This Court had held that pregnancy discrimination is *not* sex discrimination and that it violates neither the Constitution, *Geduldig v. Aiello*, 417 U.S. 484 (1974), nor Title VII, *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). Congress immediately responded with corrective legislation that defined sex discrimination to include pregnancy discrimination. The Act redefines sex discrimination, expanding on this Court's constitutional definition, and it applies to state and local governments in their capacity as employers a rule different from the constitutional rule announced in *Geduldig*.

9. The disparate treatment provisions of Title VII, 42 U.S.C. §2000e-2(a)(1) (1994), as applied to state and local pension and insurance plans. Section 5 empowers Congress to regulate sex discrimination in these plans, *see Fitzpatrick*, 427 U.S. at 448-50, and Title VII requires employers to use sexually integrated actuarial tables. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978). This Court has never held that the Constitution requires that result, even though state law routinely authorizes the use of sex-segregated actuarial tables in insurance not sponsored by employers. There was no claim that employers acted out of bad motive in these cases, or that the ban on sex-segregated actuarial tables was a prophylactic rule to avoid some other violation. Rather, Congress reweighed the competing interests in sexual equality and in traditional insurance practice. This was a far more "substantive" exercise of §5 power than RFRA.

10. The religious accommodation provision of Title VII, 42 U.S.C. §2000e(j) (1994), requires employers to reasonably accommodate the religious practices of their employees if they can do so without undue hardship. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). Under *Smith*, the Constitution generally does not require such accommodation. This provision

too enacts a broad standard and dispenses with proof of deliberate or overt discrimination; it goes further than the disparate impact provisions by requiring affirmative efforts to accommodate the religious needs of employees.

11. The backpay and attorneys' fees provisions of Title VII, 42 U.S.C. §2000e-5(g) and (k) (1994). These sections overrode many decisions enforcing the states' Eleventh Amendment immunity from suits seeking to recover money from the state treasury. *See Edelman v. Jordan*, 415 U.S. 651 (1974). Thus, it is not merely that the Constitution as interpreted by this Court does not *require* what the statute requires; rather, in the absence of the statute, the Constitution would affirmatively *forbid* what the statute requires. Such a provision would seem to be unconstitutional a fortiori under the City's reasoning. Even so, the Court upheld the states' monetary liability under the statute. *Fitzpatrick*, 427 U.S. at 453-56, reaffirmed in *Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1125, 1128 (1996).

c. The Civil Rights Attorney's Fees Awards Act.

12. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988(b) (1994), authorizes awards of attorneys' fees against states in suits to enforce certain federal rights against state officials sued in their official capacity. This provision also overrides the state's Eleventh Amendment immunity. In *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978), the Court upheld the provision in a suit to correct cruel and unusual prison conditions, that is, in a suit to enforce a liberty incorporated into the Fourteenth Amendment. In *Maher v. Gagne*, 448 U.S. 122, 129-33 (1980), the Court unanimously held that Congress has §5 power to impose fee liability following settlement of a statutory claim pendent to a substantial constitutional claim, where by definition plaintiff had not proved and the court had not found a constitutional violation.

d. The Civil Rights Act of 1866 and Amendments.

13. The Civil Rights Act of 1866, 42 U.S.C. §§1981(a) and 1982 (1994), forbids private discrimination in the making of contracts and transfer of property. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968), the Court upheld this provision

as an exercise of power to enforce the Thirteenth Amendment. "Surely Congress has power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. *Accord, Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (Congress has "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery"); *see Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75 (1989) (unanimously reaffirming the statutory holding in *Runyon*). Here Congress has proceeded by substantively redefining the scope of protection -- "determin[ing]" for itself what are the badges and incidents of slavery.

The Court in *Jones* did not decide whether the Thirteenth "Amendment *itself* did any more than" simply abolish slavery. 392 U.S. at 439. But other cases resolve that issue. "The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race." *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *see Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971) (rejecting claim that closing public facilities to avoid integration imposes a badge or incident of slavery).

14. The Civil Rights Act of 1991, 42 U.S.C. §1981(b) (1994), forbids private discrimination in the enforcement and administration of contracts. This Act amended the Civil Rights Act of 1866 and is presumably based on the same power, the power to enforce the Thirteenth Amendment. This provision goes as far beyond this Court's interpretation of the Thirteenth Amendment as the original Act.

e. The Civil Rights Act of 1871.

15. Section 2 of the Civil Rights Act of 1871, 42 U.S.C. §1985 (1994), provides a civil remedy for conspiracies to deprive any class of persons of equal rights, including First Amendment rights. *See United Bhd. of Carpenters v. Scott*, 463 U.S. 825 (1983), *infra* at 37. This Court unanimously upheld the provision, as applied to private violence against civil rights workers, as an

act to enforce the Thirteenth Amendment. *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971).[3]

f. The National Prohibition Act and Amendments.

16. Title II, §1 of the National Prohibition Act, 41 Stat. 305, 307-08 (1919), banned sales of beverages containing minute amounts of alcohol, beverages that the government "expressly admitted not to be intoxicating." *National Prohibition Cases*, 253 U.S. 350, 410 (1920) (Clarke, J., dissenting). The Court upheld this as a prophylactic means to enforce the Eighteenth Amendment, which applied only to "intoxicating liquors." 253 U.S. at 387-88. This appears to have been a clear substantive expansion beyond the scope of the Amendment.

17. Section 2 of the Supplemental Act banned many sales of alcohol for medicinal purposes, 42 Stat. 222 (1921), although the Amendment applied only to liquors sold for "beverage purposes." The Court upheld this measure unanimously. *James Everard's Breweries v. Day*, 265 U.S. 545, 558-60 (1924) (Congress "may adopt any eligible and appropriate means to make that prohibition effective"). This too may be conceived as a substantive expansion beyond the scope of the Amendment; it is perhaps better understood as a special case of dispensing with proof of motive.

2. The Lessons of Prior Enforcement Legislation.

Merely to list these statutes is to refute the City's claim that Congressional enforcement power cannot go beyond judicial interpretation of an amendment. To think about them at all is to refute the City's fallback claim that they are all distinguishable from RFRA. Here are seventeen distinct statutory provisions

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[3] Consider also the Senate version of the Civil Rights Act of 1875, 18 Stat. 335. A provision deleted in the House would have required desegregation of public schools. *See* 2 Cong. Rec., 43d Cong., 1st Sess. 3451 (1874) (text of Senate bill); *id.* at 4167 (defeat of separate-but-equal amendment); *id.* at 4176 (passage by Senate). By the City's theory, the Senate bill would have been unconstitutional at any time between *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Educ.*, 347 U.S. 483 (1954). It would presumably have been unconstitutional before *Plessy* as well, but Congress could not have known that until the Court ruled.

(actually more, because several times we have discussed related provisions together) that clearly go beyond this Court's interpretation of the Constitution.

These statutes span 125 years of the nation's history; they were enacted from 1866 to 1991. This Court's consistent interpretation of the enforcement power extends over nearly as long a period. Congresses and Presidents have repeatedly relied on this understanding of legislative power.

These statutes and their interpretations are deeply embedded in our law. Americans who know little of the constitutional debate in this case have relied on these laws for protection against exclusionary voting rules, unnecessary testing requirements, discriminatory pension and insurance benefits, and loss of employment due to pregnancy. All of these protections would be cast in doubt if the judgment below were reversed; there cannot be a reversal without a drastic shrinkage of the enforcement power.

This case presents none of the criteria for such a dramatic departure from accumulated precedent. The enforcement power has not proved unworkable. It has not been undermined by subsequent developments. It has not been a source of Congressional abuse or overreaching; except for the period of massive resistance to desegregation, it has not even been especially controversial. The issue has not been overlooked or decided without full briefing. There are no irreconcilable tensions in the cases. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992) (discussing considerations affecting the weight of precedent); *Patterson v. McLean Credit Union*, 491 U.S. 164, 169-75 (1989) (same); *Lukumi*, 508 U.S. at 571-77 (Souter, J., concurring) (same).

Most of these statutes require results that are squarely inconsistent with decisions as closely in point as *Smith* is to RFRA. These statutes created statutory rights inconsistent with *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (voting systems with racial impact but no deliberate or overt discrimination); *Washington v. Davis*, 426 U.S. 229 (1976) (employment systems with disparate impact but no deliberate or overt discrimination); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (pregnancy discrimination); *Edelman v. Jordan*, 415 U.S. 651 (1974) (state liability to pay monetary compensation); *Lassiter v. Northampton*

County Board of Elections, 360 U.S. 45 (1959) (literacy tests); and *Corrigan v. Buckley*, 271 U.S. 323 (1926) (private discrimination in real estate).

These statutes are not narrow in scope. Some apply to all voting in the country. Others apply to all public employment in the country. Unlike RFRA, these statutes do not merely require occasional exemptions from state policies that remain generally enforceable; rather, these statutes fundamentally change voting and employment systems. Unlike RFRA, some of these statutes absolutely bar particular practices under some or all conditions: states get no opportunity to justify literacy tests, voting systems with discriminatory results, sex-based pension and insurance benefits, or disparate treatment on the basis of pregnancy. These statutes intrude far more deeply than RFRA into the core processes of state and local government.

Some of these statutes enact broad standards for courts to apply in individual cases; this is most obviously true in the Voting Rights Act definition of discriminatory results and in the Title VII provisions on disparate impact. Some of these standards permit states to justify challenged practices but only on stringent showings, such as business necessity or undue hardship. These standards are not constitutionally different from the compelling interest test, which is "strict in theory," not "fatal in fact." *Adarand Constructors v. Peña*, 115 S.Ct. 2097, 2217 (1995).

These statutes are not confined to protection of freed slaves and their descendants. They extend to Cubans, *Johnson v. De Grandy*, 512 U.S. 997 (1994), Jews, *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), Arabs, *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), and Puerto Ricans, *Katzenbach v. Morgan*, 384 U.S. 641 (1966) -- even under legislation to enforce the Thirteenth Amendment. They extend to sex discrimination and pregnancy discrimination, even though Congress refused to prohibit sex discrimination in the Fourteenth Amendment. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. U.L.Q. 161, 161-63. The Attorney's Fees Awards Act, the religious accommodation provision of Title VII, and 42 U.S.C. §1985 extend to incorporated rights. The City has utterly failed to show that RFRA is somehow uniquely different from all these other laws

that go beyond judicial interpretation of the amendments.

This listing also refutes Ohio's suggestion as amicus curiae that Congress can use its enforcement power only to eliminate "a prior or ongoing constitutional wrong" as defined by this Court. Ohio Br. 20. There is plainly no such wrong when Congress defines a badge or incident of slavery that this Court would not recognize on its own, or when Congress requires states to justify a height and weight requirement with disparate impact on women, *Dothard v. Rawlinson*, 333 U.S. 321, 323-32 (1977), or a civil service examination with disparate impact on minorities, or when Congress forbids discrimination against pregnant state employees or female pension beneficiaries.[4]

This listing also shows the incoherence of the City's distinction between "substantive" and "remedial" uses of the enforcement power. The ordinary meaning of "remedial" would be legislation that provides a remedy for a judicially determined violation. Some enforcement legislation is of this sort; it authorizes causes of action, damages, injunctions, and criminal penalties. *See* 42 U.S.C. §1983 (1994); 18 U.S.C. §242 (1994). But the statutes on the foregoing list are not of this type. These statutes enable plaintiffs to prove a *statutory* violation without ever showing anything that this Court would recognize as a

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[4] Ohio also argues that RFRA should be struck down to prevent prisoners from filing frivolous RFRA suits. Ohio Br. 2-6, 24-25. But prisoners file frivolous suits under every law that applies to them; that does not make every such law invalid. Just as a state cannot "reduce the adult population of Michigan to reading only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), so Congress need not reduce the free citizens of the United States to only those rights that prisoners cannot abuse. Congress has dealt with frivolous prisoner litigation, directly and across the board, in the Prison Litigation Reform Act, Pub. L. 104-134 (1996). The PLRA requires prisoners to exhaust administrative remedies, §803(d), 42 U.S.C. §1997e, and to pay filing fees in installments out of their prison trust accounts, §804(a)(3), 28 U.S.C. §1915(b). It denies the right to file claims or appeals to any prisoner who has had claims dismissed as frivolous on three or more occasions, §804(d), 28 U.S.C. §1915(g), authorizes judicial screening of prisoner claims, §805(a), 28 U.S.C. §1915A, and authorizes forfeiture of good time credit for prisoners who file malicious or harassing claims, §809(a), 28 U.S.C. §1932. The way to deter frivolous prisoner litigation is to effectively implement this and similar legislation, not to deprive Congress of its longstanding authority under the Enforcement Clauses.

constitutional violation. If there be any sense in which these statutes are remedial, RFRA is remedial in the same sense.

The ordinary meaning of "substantive" would be legislation that defines a statutory violation in some way different from this Court's definition of a constitutional violation. But a vast range of possible legislation is substantive in this sense, from dispensing with proof of defendant's state of mind to dispensing with every element of the judicial conception of the constitutional right and substituting a wholly different set of elements. The City erroneously assumes that all "substantive" uses of the enforcement power are indistinguishable -- that if Congress can enact any one "substantive" provision, then it can enact any imaginable substantive provision. But this is the fallacy of the excluded middle. Whether RFRA is characterized as remedial or substantive, two more tangible propositions remain true: RFRA is *not* distinguishable from much familiar legislation dispensing with proof of deliberate or overt discrimination, and RFRA would be easily distinguishable from many other imaginable uses of the enforcement power.

3. The Limits of the Enforcement Power.

The federal government is a government of limited powers, so of course there are limits to the enforcement power. This case does not require identification of those limits, because RFRA is so clearly within the bounds of familiar past uses of the power. But some limits are identified by this Court's cases, and other potential limits are readily identifiable on reflection. We start with the shared proposition that the Enforcement Clauses do not confer unlimited authority to legislate on any subject; they do not make Article I irrelevant.

It is commonly said that all legislation must be rational. The Due Process Clause protects against irrational restrictions on liberty, and the Equal Protection Clause protects against irrational classifications. If Congress could impose heightened scrutiny on any liberty interest or legislative classification that this Court would subject to rational basis scrutiny, the enforcement power might well be a route to general legislative power of unlimited scope. It is therefore a necessary inference -- an inference from constitutional structure -- that Congress has no such power.

Congressional enforcement legislation must have a nexus with a constitutional right that, in the judgment of this Court, is plausibly entitled to heightened scrutiny.[5]

RFRA raises no plausible issue concerning its connection to the Fourteenth Amendment, whatever test of nexus the Court might ultimately adopt. RFRA protects only conduct that is the exercise of religion within the meaning of the Constitution as interpreted by the judiciary. 42 U.S.C. §2000bb-2(4) (1994). Congress and the Court agree that religiously motivated conduct is the exercise of religion; this Court said in *Smith* that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." 494 U.S. at 877. Congress and the Court further agree that the compelling interest test protects religiously motivated conduct against laws that are not neutral and generally applicable. Congress added only that the same test protects the same conduct against laws that *are* neutral and generally applicable. Here, as in the race cases, Congress merely dispensed with proof of deliberate or overt discrimination, expanding protection for a right that already gets heightened judicial scrutiny in an important range of cases. The extent of protection has been increased, but the subject of protection has not changed. Judicial application of the compelling interest test to some burdens on religiously motivated conduct shows that such conduct is a special concern of the Fourteenth Amendment; legislative protection of such conduct cannot grow into general power to legislate on all subjects.

Congress has rarely tested the limits of the enforcement power, so the Court has had few occasions to squarely consider them. Four justices suggested that Congress cannot protect non-suspect classifications, *EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Burger, C.J., Powell, Rehnquist, & O'Connor, JJ.

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[5] Congress need not always await judicial decision. Congress banned sex discrimination in state and local employment in 1972, see *supra* 13, although this Court did not clearly announce heightened scrutiny for sex discrimination until 1976. *Craig v. Boren*, 429 U.S. 190 (1976). The sequence is not dispositive; what is critical is that this Court accepted the Congressional judgment that sex classifications are sufficiently like other classifications requiring special justification under the Fourteenth Amendment.

(dissenting)), but the majority did not reach the issue. Five justices suggested a similar limit, in a special context, in *Oregon v. Mitchell*, 400 U.S. 112 (1970). There the Court invalidated a law granting 18-year-old citizens the right to vote in state elections. Four Justices relied on the Constitution's express recognition of state voting rules, and Justice Harlan relied on what he considered to be the clear intent of the Framers to similar effect. *Id.* at 119-26 (1971) (Black, J.) (relying on Article I, §2); *id.* at 293-94 (Stewart, J., Burger, C.J., & Blackmun, J.) (relying on "the explicit provisions of Article I, Article II, and the Seventeenth Amendment"); *id.* at 152-213 (Harlan, J.) (reviewing legislative history at great length to show that Fourteenth Amendment does not apply to voting qualifications). Thus, the principal point in these opinions is that the enforcement power is subject to other express allocations of power in the Constitution.[6]

But *Mitchell* may not be fully explained by state power over voting rules, because this Court has repeatedly held that Congress sometimes can override state voting rules. Justice Harlan's view that voting is wholly outside the Fourteenth Amendment did not prevail, so there is necessarily a second thread to the argument of the Justices who held that §5 confers no general power over voting qualifications. At least in the context of voting rights, these Justices doubted Congressional power to define a suspect classification (youth) that had none of the usual judicial indicia of suspectness. Justice Stewart noted that persons aged 18 to 21 are not a "discrete and insular minority." *Id.* at 296. Justice Harlan found it "little short of fanciful" to believe that such persons were threatened with unconstitutional discrimination. *Id.* at 212. Justice Black denied that Congress could "prohibit every discrimination between groups of people." *Id.* at 127.

In *Mitchell* these comments were inextricably linked to state power over voting qualifications, a point these Justices elaborated at much greater length. But these comments also suggest the limit proposed here: Congress could not make youth a suspect

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[6] RFRA poses no issue under that limit; the Constitution recognizes no specific state power to burden or regulate religion. The powers affected by RFRA are part of the general reserve of state powers, fully subject to the Fourteenth Amendment.

classification unless this Court agreed that youth was sufficiently like other suspect classications to justify Fourteenth Amendment protection.

Any other exercise of an enforcement power must have a similarly reasonable nexus to a judicially determined right. Thus, Congress can define the badges and incidents of slavery, but Congress cannot call just anything a badge or incident. In the *Civil Rights Cases*, this Court acknowledged that Congress could treat inability to contract or hold property as badges or incidents, but it held that discrimination by innkeepers was too remote from slavery to be a badge or incident. 109 U.S. 3, 20-25 (1883).

Palmer v. Thompson, 403 U.S. 217 (1971), is important for the light it casts both on the power to define badges and incidents of slavery and on the meaning of *Oregon v. Mitchell*. The five Justices joining the opinion of the Court in *Palmer* were the same five who had combined, earlier the same Term, to strike down the 18-year-old vote in *Mitchell* (Burger, C.J., Black, Harlan, Stewart, & Blackmun, JJ.). The City claims that *Mitchell* somehow dramatically confined the enforcement power, but in *Palmer* we find these same five Justices reaffirming Congressional power to define badges and incidents of slavery far beyond judicial interpretation. After firmly rejecting the claim that closing swimming pools to avoid integration imposed a badge or incident of slavery that courts could identify, the Court continued:

> [A]lthough the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones v. Alfred H. Mayer Co.* could empower Congress to outlaw "badges of slavery." [quoting the Enforcement Clause] But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.

Id. at 227. This is a clear reaffirmation of Congressional power to go far beyond judicial interpretation, by the same Justices who are supposed to have rejected that power in *Mitchell*. These Justices also joined Justice Stewart's opinion for a unanimous Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), upholding

42 U.S.C. §1985(3) (1994), and stating that Congressional power to enforce the Thirteenth Amendment "extend[s] far beyond actual imposition of slavery or involuntary servitude." *Id.* at 105. The City and its amici badly misread *Mitchell*, because they ignore the two prophylactic Acts upheld in that case, they ignore the heavy reliance on state power over voting rules in the opinions striking down the 18-year-old vote, they ignore Justice Stewart's statement that "Congress may paint with a much broader brush than may this Court," 400 U.S. at 284, and they fallaciously assume that if the 18-year-old vote was "substantive" and the Court struck it down, then the Court must strike down any other exercise of the enforcement power that can be labeled "substantive." *Palmer* and *Griffin* are contemporaneous proof that the five Justices who struck down the 18-year-old vote meant no such thing.

Another plausible limit, also suggested by four Justices, is that Congress has no power to forbid practices that it authorizes the federal government to engage in, because that authorization would imply that Congress does not really think the practices must be banned to enforce constitutional rights. *EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Burger, C.J., Powell, Rehnquist, & O'Connor, JJ. (dissenting)). RFRA raises no such issue. RFRA is fully applicable to all federal law, 42 U.S.C. §2000bb-3(a), and Congress did as much as it could to bind future Congresses. Future Congresses can of course amend RFRA with respect to both state and federal law, but if they amend it with respect to federal law, they must do it explicitly. 42 U.S.C. §2000bb-3(b) (1994). Congress cannot casually or inadvertently make new federal law exempt from RFRA.

Another limit is the substantial restrictions on Congressional authority to dispense with the state action requirement in legislation to enforce amendments that contain such a requirement. *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 830-33 (1983); *James v. Bowman*, 190 U.S. 127 (1903); *Civil Rights Cases*, 109 U.S. 3, 11-14 (1883).[7] The City relies heavily on the *Civil*

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[7] *But see District of Columbia v. Carter*, 409 U.S. 418, 423 n.8 (1973) (dictum that Congress may "proscribe purely private conduct under §5"); *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971) (reserving the issue); *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, Black, & Fortas, JJ.); *id.* at 781-84

Cases, but they hold only that Congress cannot dispense with proof of state action. The state action requirement is textually explicit, it is definitionally and structurally central to all constitutional rights except the Thirteenth Amendment, and it is rarely difficult to prove. There is ample justification for this Court's distinction between proof of state motive, which Congress can and often does dispense with, and proof of state action, which Congress generally may not dispense with.

The most obvious limit on the enforcement power is that Congress has no power to violate any constitutional right adjudicated by the courts.

> We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); *accord, Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982). The enforcement power is sometimes described as a ratchet; more precisely, Congress can raise but not lower the baseline of protection provided by judicial interpretations of the Constitution. This follows from the universal rule that Congress cannot violate the Constitution as interpreted by the courts. This limitation is equally applicable whether Congress acts under an Enforcement Clause, the Commerce Clause, or any other power.

Thus, a law prohibiting or restricting the free exercise of religion would not be a law to enforce religious liberty. An application of RFRA that violates the Establishment Clause, if there be any such application, would be unconstitutional. The City's claimed fear that Congress might somehow use its enforcement power to violate religious liberty is therefore not a fear while this Court sits. RFRA in no way reduces this Court's power to enforce judicially recognized rights to religious liberty.

(Brennan, J., Warren, C.J., & Douglas, J.) (six Justices stating that Congress can ban private conspiracies to interfere with Fourteenth Amendment rights); *Ex parte Yarbrough*, 110 U.S. 651, 664-66 (1884) (upholding Fifteenth Amendment power to punish private violence to prevent voting in federal election); *infra* at 38-40 (reviewing evidence of original understanding).

This limit on the enforcement power was at issue in recent cases limiting the use of racial preferences in voting, employment, and government contracting. *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Adarand Constructors v. Peña*, 115 S.Ct. 2097 (1995). To the extent that white voters, workers, or contractors have a judicially enforceable right not to be disadvantaged because of race, Congress presumably has no power to "restrict, abrogate, or dilute" that right. "The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring). But this Court expressly reserved that question in *Adarand*, 115 S.Ct. at 2114, and it appears to remain open.

No resolution of that issue would affect RFRA, and upholding RFRA would not prejudice the position of any Justice on either side of that issue. Justices who deny such power can rely squarely on footnote 10 of *Katzenbach v. Morgan*: Congress has power to protect constitutional rights, but it has no power to violate constitutional rights.

This discussion shows that what the City lumps together as "substantive" legislation in fact presents a series of questions about different kinds of protections for judicially protected rights. Can Congress increase protection for every interest protected by rational basis review in this Court? Certainly not. Can Congress forbid a classification that this Court would permit? Perhaps not. Can Congress ignore the state action requirement? Probably not. Can Congress expand the scope of constitutionally protected conduct or a constitutional concept? The badges-and-incidents cases suggest that it can, as does general acceptance of the Pregnancy Discrimination Act, but there are limits of degree; in any event, Congress has not done so here. Can Congress reject a proffered justification for burdening constitutional rights that this Court would have accepted? The pension cases imply that it can, but again, there may be limits of degree. Can Congress protect a right that this Court has refused to incorporate, such as the Second or Seventh Amendment? Perhaps not; it will be time enough to decide if Congress ever tries. Can Congress override countervailing constitutional rights or other express constitutional

allocations of power? Generally not; perhaps absolutely not.

Can Congress dispense with proof of deliberate or overt discrimination? That is the only question presented here, and the answer is clearly yes. No use of the enforcement power is better settled than this. Reaffirming this settled rule does not dictate any answer to the myriad of other questions not presented.

D. Congress Had Ample Basis for Its Judgment That Religious Exercise Requires Statutory Protection.

Congress created a substantial record of its reasons for believing that RFRA is necessary to enforce religious liberty. Congress "is not required to make formal findings" at all, *United States v. Lopez*, 115 S.Ct. 1624, 1631 (1995), but appropriate findings clarify the basis of legislation and simplify the judicial task. Such findings may be found in committee reports, which this Court has "repeatedly recognized [as] the authoritative source for legislative intent." *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *see Preseault v. ICC*, 494 U.S. 1, 17-19 (1990) (citing findings in committee reports). Evidence to support Congressional action may also be found in hearing testimony, *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964), or even in floor speeches. In *Katzenbach v. Morgan*, the only "findings" were in the floor speeches of individual members. 384 U.S. 641, 655-58 nn.16-18; *id.* at 669 & n.9 (1966) (Harlan, J., dissenting). The principle is simple: courts do not dictate how Congress conducts its business.

Three findings explain the need for RFRA and the solution chosen. First, Congress found that generally applicable laws burden religion and can be used for that purpose. S. Rep., *supra* note 1, at 5, 8, 1993 U.S.C.C.A.N. at 1894, 1897; H.R. Rep., *supra* note 1, at 2. Second, Congress found that litigation over governmental motives is not a reliable means of protecting religious liberty. *Id.* at 6. Third, Congress found that specific exemptions in individual laws are not a reliable means of protecting religious liberty. *Id.*; S. Rep. at 8, 1993 U.S.C.C.A.N. at 1897. These findings explain the problem to be solved and why other solutions would not work. Congress enacted the only remaining solution -- a generally applicable protection for religious liberty that dispensed with proof of motive and with the need to enact individual exemptions.

The Congressional findings on burden commingle two conclusions, either of which is sufficient to justify the Act. First, Congress found that without RFRA, government could use neutral and generally applicable laws to deliberately discriminate against religion, and that sometimes it would do so. Both Committees found that facially neutral laws had been used to burden religion through all or much of American history. *Id.* at 5 & n.3, 1993 U.S.C.C.A.N. at 1894-95 & n.3; H.R. Rep. at 2 & n.2. The Committees cited testimony that three of the greatest religious persecutions in American history -- that against the Mormons in the nineteenth century, that against the Jehovah's Witnesses in the 1930s and 40s, and the Ku Klux Klan's attempt to close Catholic schools in the 1920s -- had been based on facially neutral, generally applicable laws.

Congress also heard testimony about contemporary hostility between churches and secular interest groups, use of zoning laws to exclude minority faiths, "old-fashioned religious prejudice" against Jehovah's Witnesses, continuing discrimination against minority religions, indifference or hostility to religious needs, and hundreds of burdens on American Indian religious practices. *See 1992 House Hearings, supra* note 1, at 104, 107-08, 123-24, 149, 157-58, 326, 334-39, 436; *Senate Hearing, supra* p.6, at 5-6, 15-26, 71-78, 144-45, 246-50. Opinion surveys confirm the testimony and findings that hostility to minority religions still infects the democratic process. Only 12% of Americans say they would not like to have "blacks" as neighbors. George Gallup, Jr., *The Gallup Poll: Public Opinion 1989* at 63, 67 (1990). But 30% say they would not like to have "religious fundamentalists" as neighbors, *id.* at 76, and 62% say they would not like to have "members of minority religious sects or cults" as neighbors, *id.* at 77. A plurality (45%) have "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86% have mostly or very unfavorable opinions of "members of religious cults or sects." George Gallup, Jr., *The Gallup Poll: Public Opinion 1993* at 75-76, 78 (1994). Congress has ample cause to suspect the reasons for laws that burden religion.[8]

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[8] Indeed, St. Peter Church is located where it is because religious hostility forced it to locate outside the original city limits of Boerne. Kendall County

Congress also feared that the victims of deliberate religious discrimination would not always be able to prove the fact. The House Judiciary Committee found that:

> After *Smith*, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. Legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.

H.R. Rep., *supra* note 1, at 6. This Court has noted its "reluctance to attribute unconstitutional motives to the States." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). Congress heard testimony that if legislators wanted to target a particular religion, "they would camouflage in a law of general applicability." *1992 House Hearings*, *supra* note 1, at 105. Even discriminatory classifications can be camouflaged, as this Court knows. In *Lukumi*, this Court unanimously found discrimination amounting to a violation of the "fundamental nonpersecution principle." 508 U.S. at 523. Yet it took six years of litigation to achieve that result, and the victims had not received a single vote in any lower court. If such flagrant discrimination is so hard to prove, how are churches to litigate cases of subtle discrimination?

Second, Congress concluded that substantial burdens on religious exercise violate religious liberty even if the burden is neutral and generally applicable and not badly motivated. From the perspective of believers, it makes little difference whether the prohibition is found in a discriminatory law or in a facially neutral law of general applicability. Either way, they must abandon their religious practice or risk criminal punishment. Either way, their religious exercise has been prohibited.

These Congressional judgments parallel two of the possible judgments held sufficient in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The Court said there that Congress might have questioned New York's motives for retaining its English language literacy requirement. *Id.* at 654. Alternatively:

> Congress might have also questioned whether denial of a right deemed so precious and fundamental in our

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Historical Comm'n, *A History of Kendall County Texas* 22 (1984).

> society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.

Id. at 654. Similarly here, Congress "questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of" achieving less-than-compelling state interests.

One or both of these judgments must underlie all the statutes in which Congress supplemented constitutional protection against deliberate or overt discrimination with statutory protection against discriminatory impact or effect. These laws make sense only on the ground that insufficiently justified effects sometimes result from forbidden motives that cannot be proved, or that insufficiently justified effects themselves violate the burdened right. These explanations go hand in hand, and the Court has not required Congress to choose between them.

The City's distinction between remedial and substantive theories of §5 appears to turn on this choice between Congressional explanations. The City concedes that if Congress dispensed with proof of deliberate or overt discrimination against religion because it believed that such discrimination exists, then its action was remedial and RFRA is valid. *See* City Br. 33 (conceding that Congress can find facts "at odds with Supreme Court determinations under *the same standard*"). But if Congress dispensed with proof of deliberate or overt discrimination against religion because it believes that such discrimination is unnecessary to a constitutional violation, then its action was substantive and RFRA is invalid. This is the apparently intended meaning of the City's contrasting statement that Congress cannot enforce "ends not guaranteed by the Constitution." *Id.*

This argument makes validity turn not on what Congress did, but on what Congress thought. What Congress did -- in RFRA, Title VII, and the Voting Rights Acts -- was dispense with proof of deliberate or overt discrimination. The City claims that Congress can do this for some reasons but not others; Congressional motive would be determinative. Ohio's brief makes this explicit: the alleged constitutional defect is that "What *motivated* Congress in passing RFRA was something different." Ohio Br. 8 (emphasis added). But it is settled that a permissible

exercise of Congressional power does not become impermissible if this Court disapproves of Congress's motives. *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810). The central distinction offered by the City and its amici is wrong as a matter of law.

It is also wrong as a matter of fact. The City's argument requires this Court to reject Congress's findings about the misuse of facially neutral laws. The City seems to think these findings were in error, or that misuse was not sufficiently widespread to justify legislation, or that findings on what the City calls the remedial theory somehow do not count if Congress also believed in what the City calls the substantive theory. But this Court cannot reject findings that have a rational basis, as these findings clearly do. And if Congress finds that facially neutral laws are sometimes misused, it is for Congress to balance costs and benefits and decide whether the frequency of such misuse is sufficient to justify legislation. When Congress chooses means, "this Court may not inquire into the degree of their necessity." *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924).

Nor is there a constitutional difference between the findings that led to RFRA and the findings that led to other enforcement legislation. The legislative history of the 1982 Amendments to the Voting Rights Act emphasized both sets of reasons, and repeatedly denounced this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). S. Rep. No. 97-417 at 15-43 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 192-221. The Senate Committee actually gave priority to the reason the City calls substantive:

> During the hearings, there was considerable discussion of the difficulty often encountered in meeting the intent test, but that is not the principal reason why we have rejected it. The main reason is that, simply put, the test asks the wrong question.

Id. at 36, 1982 U.S.C.C.A.N. at 214.

The Congress that amended Title VII in 1972 explicitly rejected the view that employment discrimination is principally a matter of bad motive. The Senate Report stated: "Experts familiar with the subject now generally describe the problem in

terms of 'systems' and 'effects' rather than simply intentional wrongs." S. Rep. No. 92-415 at 5 (1972). The House Report did not say that employers use civil service tests for the purpose of excluding minority applicants, or even that tests perpetuate past discrimination in education. Rather, the Committee found that minorities and other "culturally disadvantaged groups" perform less well on standardized tests "because of low incomes, substandard housing, poor education, and other 'atypical' environmental experiences." H.R. Rep. No. 92-238 at 20-21 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2156. Congress did not require justification of disparate impact as a way to police bad motive; rather, Congress believed that unjustified disparate impact is itself a form of discrimination that should be forbidden.

It is true that extraordinary state resistance to black voting rights preceded the Voting Rights Act of 1965. But such history is not needed to support the enforcement power, and is in fact anomalous among modern enforcement legislation. Variations on the RFRA pattern have been far more common: some bad motive, some hostile indifference, some suspicious but unprovable circumstances, some questionable classifications, some innocent but unjustified effects. There was no history of resistance to black voting rights or misuse of literacy tests in northern and western states to support the 1970 Voting Rights Act. Resistance to black voting had largely dissipated even in the south by the time of the 1982 Amendments, which were aimed at second and third generation voting rights problems. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1838-53 (1992) (analyzing the evolution of voting rights cases). State and local governments have myriad legitimate reasons, and also a range of more questionable but clearly non-racial reasons, for annexations, for at-large elections, and for drawing single-member districts one way instead of another. Yet all these devices are subject to challenge, preclearance, or both, under the original Voting Rights Act and its amendments.

Title VII is even less consistent with the City's theory. The extension of disparate impact provisions to state and local employment required justification of many employment practices adopted with no hint of bad motive, including civil service

examinations and size and strength requirements. Perhaps there are jurisdictions that designed civil service requirements to exclude minority employees, but the dominant history is quite different: merit appointment emerged as part of a great reform designed to eliminate serious abuses in patronage appointments. *See* Ronald N. Johnson & Gary D. Liedecap, *The Federal Civil Service System and the Problem of Bureaucracy* 12-47 (1994).

The City repeatedly suggests that Congress could enact legislation to protect specific religious practices, but that it cannot enact a general standard to protect all religious practices. City Br. 25, 29, 32, 47. This would be a wholly unprincipled restriction on Congressional discretion. Congress considered and rejected the possibility of specific statute-by-statute exemptions, and for good reason: such an approach can never achieve equal protection of the laws, especially for small and unpopular faiths.

Specific exemptions require churches to monitor pending legislation at every level of government, and to engage in perpetual legislative battles with other interest groups. Congress, which is surely expert on the legislative process, found that individual exemptions are unworkable:

> It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute.

H.R. Rep., *supra* note 1, at 6.

> State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths . . .

S. Rep., *supra* note 1, at 8, 1993 U.S.C.C.A.N. at 1897. This Court has acknowledged the point, recognizing that in a system of specific exemptions in each statute, "the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. Such selective exemptions are not only bad policy; they invite constitutional attack. This Court has been suspicious of narrow legislative exemptions that benefit only one or a few religious groups. *Board of Educ. v. Grumet*, 114 S.Ct. 2481, 2491-92 (1994) (rejecting an

accommodation because of its "anomalously case-specific nature"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (distinguishing Title VII requirement of religious accommodation from absolute protection for Sabbath observers, in part because Title VII protects "all religious beliefs and practices rather than protecting only the Sabbath observance").

RFRA provides the legislative protection for religious exercise that this Court contemplated in *Smith*. It does so in a way that avoids the discrimination among faiths that the Court feared was unavoidable, and it does so in the only way that Congress found to be legislatively feasible.

E. Power to Enforce the Fourteenth Amendment Includes Power to Enforce Religious Liberty.

Most of this Court's case law on §5 involves laws to enforce the Equal Protection Clause. This case involves a law to enforce the religious liberty component of the Due Process Clause, a right commonly said to be "incorporated" from the First Amendment.

It makes no difference. The Fourteenth Amendment is the only federal constitutional provision that protects religious liberty against the City of Boerne. The First Amendment does not apply to the states or their subdivisions. Rather, "the fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). If Congress is enforcing anything in this case, it is the Fourteenth Amendment.

Congress has power to enforce "the provisions" of the Amendment -- not one of them or some of them, but simply "the provisions." There is no basis to distinguish the Equal Protection Clause from the Due Process Clause. Speaking of another enforcement statute, this Court said:

> [N]o possible reason suggests itself for concluding that §241 -- if it protects Fourteenth Amendment rights -- protects rights secured by the one Clause but not those secured by the other.

United States v. Guest, 383 U.S. 745, 753 (1966). Twice this Court has said it has "no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by

the Due Process Clause of the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 789 (1966); *United States v. Williams*, 341 U.S. 70, 72 (1951).

Congress has enacted other laws to enforce provisions of the Bill of Rights that have been incorporated into the Fourteenth Amendment. The most obvious of these are 42 U.S.C. §1983 (1994), providing remedies for violations of federal rights under color of state law, and 42 U.S.C. §1988(b) (1994), providing for attorneys' fees. These provisions have been used to enforce rights incorporated from the First, Fourth, Fifth, and Eighth Amendments in thousands of cases.

The religious accommodation provision of Title VII protects the right to free exercise of religion. This provision goes well beyond what this Court would require by judicial interpretation, but no one has suggested that it is beyond the reach of §5. The Court also assumed that Congress has power to protect First Amendment rights in *United Bhd. of Carpenters v. Scott*, 463 U.S. 825 (1983), a suit alleging anti-union violence. The Court was closely divided on whether Congress can protect First Amendment rights against purely private action, but no Justice suggested that Congress could not protect First Amendment rights at all.

This Court has also upheld Congressional power to protect the right to travel. *Oregon v. Mitchell*, 400 U.S. 112 (1970), (*supra* at 12-13, upholding Congressional restrictions on residency periods for voting); *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971). No one thought it controlling that this right does not appear explicitly in the Fourteenth Amendment, or that it does not derive from the Equal Protection Clause.

Thus, it is well settled that §5 authorizes Congress to protect rights incorporated into the Fourteenth Amendment. And it is well settled that §5 authorizes Congress to provide greater protection for constitutional rights than this Court would provide on its own. RFRA merely combines these two settled features of the enforcement power, using both in a single statute. *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978), is precedent for this combination, overriding the Eleventh Amendment to enforce incorporated rights. *Mitchell* is also precedent for this combination, for when it was decided in 1970, this Court had not yet invalidated durational residency requirements.

F. The Original Understanding Supports a Broad Enforcement Power.

The original understanding of the Reconstruction-era Enforcement Clauses is evidenced in the debates over each Amendment and also in the debates over enforcement legislation. The Congresses that proposed the Amendments, and their immediate successors with many of the same members and leadership, repeatedly debated the scope of the newly conferred powers. This much is common ground. *See* Brief of Clarendon Foundation in Support of Petitioner at 10, relying on the "far more detailed" debates of 1871 to show the meaning of §5, proposed in 1866. The constitutional issue was not neglected, and control did not shift until March 1875 (*after* the 1875 Civil Rights Act).

The enforcement legislation of these Reconstruction Congresses shows that the original understanding of the enforcement power went well beyond the literal meaning of all three Reconstruction Amendments, and also well beyond this Court's ultimate interpretation of those Amendments. These Congresses repeatedly enacted legislation that regulates private conduct, thus going beyond the Fourteenth and Fifteenth Amendments, and that requires far more than a mere end to slavery or involuntary servitude, thus going beyond the Thirteenth Amendment. Examples include the Civil Rights Act of 1866, *supra* at 16-17, which forbids private discrimination with respect to contracts and property; the Enforcement Act of 1870, 16 Stat. 140, the surviving section of which is now codified at 18 U.S.C. §241 (1994), which forbids private conspiracies to violate federal rights; §2 of the Civil Rights Act of 1871, *supra* at 17-18, which forbids private conspiracies to deprive any class of persons of equal rights; and the Civil Rights Act of 1875, 18 Stat. 335, which forbad private discrimination in places of public accommodation. The debates reflect a range of theories, but this legislation, all enacted at least by a simple majority and some of it enacted by a two-thirds majority, necessarily reflects the then-prevailing understanding of the enforcement power.

This Court struck down some of these enactments, *Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the 1875 Act), and upheld others on theories narrower than those apparently intended by the enacting Congresses, *Jones v. Alfred H. Mayer*

Co., 392 U.S. 409 (1968) (upholding 1866 Act only under the Thirteenth Amendment); *United States v. Guest*, 383 U.S. 745 (1966) (opinion of the Court reserves the constitutionality of the 1870 Act as applied to private action, although six Justices affirm its constitutionality in separate opinions); *Griffin v. Breckenridge*, 403 U.S. 88, 104-07 (1971) (upholding the 1871 Act only under the Thirteenth Amendment, reserving the Fourteenth Amendment issue). These decisions are relevant to arguments from precedent, but the precedent is overwhelming that Congress can enact RFRA. *See supra* 10-29. The City's amici seek to overturn settled precedent with an appeal to original understanding. The evidence of original understanding is that Reconstruction Congresses enacted these laws, not that this Court struck some of them down.

Congress first joined issue over whether the Enforcement Clause of the Thirteenth Amendment authorized the Civil Rights Act of 1866. The sponsors argued that it did, because the Act banned the badges and incidents of slavery. Cong. Globe, 39th Cong., 1st Sess. 41 (1865) (Sen. Sherman); *id.* at 474-75 (1866) (Sen. Trumbull); *id.* at 1118 (Rep. Wilson); *id.* at 1159 (Rep. Windom). Some moderate Republicans rejected this theory; it is common ground that one purpose of the Fourteenth Amendment was to remove doubt about the validity of the Civil Rights Act. Clarendon Br. 9; Cong. Globe, 39th Cong., 1st Sess. 2498 (1866) (Rep. Broomall); *id.* at 2542 (Rep. Bingham). But the Fourteenth Amendment has a state action requirement, so if Congress were confined to the constitutional text, that Amendment would not solve the problem either. The Civil Rights Act required Congressional power to go beyond the text of either Amendment.

Similar debates surrounded each successive bill. Congress acted on the view that the enforcement power should and did have limits, and that it should not and did not confer a general power to substitute federal law for state law. The City's amici rely on speeches to this effect. Clarendon Br. 5-12. But again they commit the fallacy of the excluded middle: Many prophylactic rules to achieve the purposes of the Amendments fall far short of general power to substitute federal law for state law.

Thus, moderate Republicans criticized an early draft of the Civil Rights Act of 1871 because it could be read as making a federal crime and tort of every offense on a long list of offenses.

Cong. Globe., 42d Cong., 1st Sess. app. 113 (1871) (Rep. Farnsworth). Yet the critics voted for the bill after it was amended to require that the crime or tort be motivated by a desire to interfere with equal protection of the laws or the privileges and immunities of citizens. *Id.* at 522. The final bill applied to private conduct, and except for the state action requirement, it tracked the Fourteenth and Fifteenth Amendments, which it was meant to enforce. Yet it passed, and Reps. Farnsworth and Garfield, so heavily relied on by the City's amici, both voted for it. *Id.* They believed that the enforcement power should not be allowed to grow into a general legislative power, but they plainly did not believe that it was confined to the judicially enforceable meaning of the Amendments.

This Court has already reviewed the legislative history on which the City's amici rely. *Kush v. Rutledge*, 460 U.S. 719, 724-27 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 96-103 (1971). Each time, the Court unanimously and correctly concluded that the Congressional purpose was to avoid enacting an "open-ended" or "general federal tort law." 460 U.S. at 725; 403 U.S. at 102. The City's amici show no more than this.

RFRA does not violate these limitations in the original understanding. It does not enact uniform federal law or generally displace state law; it does not create a general federal tort law. State and local governments are free to enact any policy and to enforce it against anyone whose violation is not religiously motivated. When a law burdens a religious practice, the governmental unit can repeal the law; it can narrow the law for everyone in a way that excludes the religious act; it can exempt the burdened religious exercise; it can justify the burden on religion; or it can craft some combination of these alternatives.

Space does not permit a careful review of the debates of the Reconstruction era, but many statements support the broad view of the enforcement power taken in the early legislation and in this Court's precedents. Those Congressmen had lived through *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), and they did not trust the Supreme Court to rule on the constitutionality of Reconstruction, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). Some of them naturally argued that the enforcement power was

needed because judges might not enforce the new Amendments.[9] They argued that the courts had not enforced the Privileges and Immunities Clause of Article IV.[10] Others argued that the enforcement power would add nothing if it were confined to the judicially enforceable meaning of the Amendment.[11] Others urged in strong terms that Congress must be the judge of what legislation was "appropriate" to enforce the Amendments.[12] Others emphasized that Congress had power to do whatever was necessary, or power to enforce the end, object, spirit, or principles of the Amendments.[13]

Rep. Wilson argued that the Amendment was not confined to facially discriminatory laws, for such laws "would be an insult to the age, and could not, therefore, have been contemplated by the framers of this article." Cong. Globe, 42d Cong., 1st Sess. 482 (1871). Sen. Pool offered a form of the ratchet explanation of the enforcement power, arguing that Congress is limited when it acts "for the purpose of restraining liberty," but that it is much less limited when it acts for "the purpose of securing and protecting the liberty of the citizen, and the rights and immunities of American citizenship." *Id.*, 41st Cong., 2d Sess. 3611 (1870).

The framers also intended §5 to authorize enforcement of

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[9] Cong. Globe, 41st Cong., 2d Sess. 3568 (1870) (Sen. Sherman); *id.* at 3654-55 (Sen. Howard); *id.*, 42d Cong., 1st Sess. app. 229 (1871) (Sen. Boreman).

[10] *Id.*, 39th Cong., 1st Sess. 41 (1865) (Sen. Sherman); *id.* at 1034 (1866) (Rep. Bingham); *id.* at 1054 (Rep. Higby); *id.* at 2961 (Sen. Poland).

[11] *Id.*, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe); *id.*, 42d Cong., 2d Sess. 525 (1872) (Sen. Morton); *id.* at 762 (Sen. Carpenter); 2 Cong. Rec., 43d Cong., 1st Sess. 4085 (1874) (Sen. Carpenter).

[12] Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull); *id.* at 1118 (Rep. Wilson); *id.*, 39th Cong., 2d Sess. 345 (1867) (Rep. Kasson); *id.*, 42d Cong., 1st Sess. 322 (1871) (Rep. Stoughton); *id.* at 393 (Rep. Smith of New York); *id.* at 482-83 (Rep. Wilson); *id.* at app. 70 (Rep. Shellabarger); *id.*, 42d Cong., 2d Sess. 728 (Sen. Sumner); 2 Cong. Rec., 43d Cong., 1st Sess. app. 358 (1874) (Sen. Morton).

[13] Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (Sen. Trumbull); *id.*, 41st Cong., 2d Sess. 3563 (1870) (Sen. Carpenter); *id.*, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe); *id.*, 42d Cong., 2d Sess. 761 (Sen. Carpenter); 2 Cong. Rec., 43d Cong., 1st Sess. app. 358 (1874) (Sen. Morton).

what we now call incorporated rights. The anti-slavery movement retained strong religious elements throughout its history. For many Congressional opponents of slavery, some of the most important of slavery's many evils were that slave states restricted religious meetings and deprived slaves of the Scriptures. Thus, the protection of religious liberty was a central part of the agenda of Reconstruction. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U.L. Rev. 1106, 1131-37, 1145-49 (1994). This history is part of the social and political background to the explanation of §5 on the floor of the Senate.

Senator Howard introduced the revised draft of the Fourteenth Amendment, on behalf of the Joint Committee on Reconstruction. Cong. Globe, 39th Cong., 1st Sess. 2764-65 (1866). He treated the grant of Congressional power to enforce the Bill of Rights as an important feature of the Amendment. After stating that the privileges and immunities of citizens of the United States included the provisions of the first eight amendments, he continued:

> Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. . . . [T]hey stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them . . . As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out *all* the principles of *all* these guarantees, a power not found in the Constitution.

Id. at 2765-66 (emphasis added).

Rep. Bingham, the lead sponsor in the House, was equally clear in his closing speech summing up the first draft of the

Amendment. *Id.* at 1088-90.[14] Congress generally relied on the Privileges and Immunities Clause as the vehicle of incorporation; this Court has chosen the Due Process Clause. But Congress and the Court agree on the essential point: the Fourteenth Amendment protects religious liberty against the states, and Congress has power to enforce that protection by appropriate legislation.

III. RFRA Does Not Infringe on the Judiciary's Power to Interpret or Apply the Law.

The City argues that RFRA violates separation of powers, by directing this Court's interpretation of the Free Exercise Clause. This argument is just a relabeling of the claim that Congressional power under the Enforcement Clauses is confined to judicial interpretation of the amendments to be enforced. Once it is clear that the enforcement power is not so confined, then it is equally clear that legislation under the Enforcement Clauses will sometimes lead to results in particular cases different from the results that would have obtained in the absence of legislation. This is not a separation-of-powers violation; it is the natural result of each branch exercising its own separate powers.

Congress simply enacted new legislation, creating new law to be applied in future cases. An independent judiciary will interpret and apply this new law as it interprets and applies all new laws. Every time Congress legislates, it intends that some future cases will be decided differently from how they would have been decided under prior law without the new statute. RFRA is at most

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[14] To similar effect, see *id.*, 42d Cong., 1st Sess. 475-76 (1871) (Rep. Dawes); *id.* at 486 (Rep. Cook) (freedom of speech); *id.* at 499 (Rep. Frelinghuysen) (just compensation); *id.* at 567 (Sen. Edmunds) (Catholics and Methodists protected); *id.* at app. 84 (Rep. Bingham); *id.* at app. 310 (Rep. Maynard); *id.*, 42d Cong., 2d Sess. 762 (1872) (Sen. Carpenter) ("right of preaching the gospel" protected); 2 Cong. Rec., 43d Cong., 1st Sess. 384-85 (1874) (Rep. Miller); *id.* at 420 (Rep. Herndon); *id.* at app. 242 (Sen. Norwood); *see* Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (Sen. Nye) (arguing that Necessary and Proper Clause already authorized Congress to enforce the Bill of Rights against the states); *id.* at 1629 (Rep. Hart) (arguing that Republican Form Clause obligated Congress to enforce the Bill of Rights against the states); *see generally* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986).

a pointed example of this universal fact of legislation. But pointed legislation is not unconstitutional. A new law may focus on a narrow range of issues, or even on a single case, without being invalid. Indeed, this Court has unanimously upheld legislation designed only to change the result in particular pending lawsuits. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992).

Compared with *Robertson*, RFRA does not even present an arguable separation-of-powers question. RFRA mentions specific cases only in the Congressional findings, not in the operative provisions of the statute. The committee reports expressly disclaimed any intention to codify the results of particular past cases or to dictate results in particular future cases. S. Rep., *supra* note 1, at 9, 1993 U.S.C.C.A.N. at 1898; H.R. Rep., *supra* note 1, at 7. Congress did not seek to reopen the final judgment in *Smith* or in any other case. Thus, *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447 (1995), holding that Congress cannot direct the reopening of final judgments, has no application.

Nor did Congress attempt to change this Court's interpretation of the Constitution. It is undisputed that *Smith* remains the law of the Constitution. In this very case, Count I alleges a violation of RFRA and Count II alleges a violation of the Free Exercise Clause as interpreted in *Smith*. No one has suggested at any point that RFRA affected the meaning of *Smith* or the Free Exercise Clause. The committee reports are absolutely clear on this. The Senate Committee stated:

> While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition . . .

S. Rep., *supra* note 1, at 14 n.43, 1993 U.S.C.C.A.N. at 1904 n.43. Similarly, the House Committee stated that "H.R. 1308, the Religious Freedom Restoration Act of 1993, responds to [*Smith*] by creating a statutory right." H.R. Rep., *supra* note 1, at 1.

Occasional Congressional comments to the effect that the bill would reverse, override, or overturn *Smith* were simply verbal shorthand for this creation of a statutory standard that would lead

to a different result in future cases. For example, Rep. Hyde said that the bill "will overturn" *Smith*. 139 Cong. Rec. H2357 (May 11, 1993). Three paragraphs later, he elaborated:

> Of course, the label restoration is inappropriate in this context since the Congress writes laws--it does not and cannot overrule the Supreme Court's interpretation of the Constitution. We are unable to restore a prior interpretation of the first amendment. H.R. 1308 is a proposed Federal statute . . .

Id. at H2358. His elaboration makes clear that he understood precisely how the bill worked, and that he did not intend anything different when he said that the bill would "overturn" *Smith*.

There is no room for doubt about what the statute does or how it works. But if there were an ambiguity, it would be immediately resolved by basic canons of statutory construction. Statutes are to be construed, if fairly possible, in ways that avoid constitutional difficulty, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979), and in ways that do not render them "inoperative," *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 n.22 (1986), "ineffective," *United States v. Powers*, 307 U.S. 214, 217 (1939), or "nugatory," *United States v. Tappan*, 24 U.S. (11 Wheat.) 419, 426 (1826).

The text of RFRA reads as a statutory right, and the committee reports explain it as a statutory right. To avoid this straightforward interpretation, and construe it instead as an obviously invalid attempt to change the meaning of the Constitution without a constitutional amendment, is to search out a bizarre interpretation in order to destroy the statute. But such an interpretation would be plain error, for "the cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

IV. RFRA Does Not Violate the Establishment Clause.

The City briefly argues that RFRA violates the Establishment Clause, but this is close to frivolous. We doubt that this Court has ever before heard an Establishment Clause claim with the

leading organizational defenders of that Clause on the other side.[15]

RFRA exempts religiously motivated conduct from burdensome regulation. This Court has unanimously upheld such exemptions against Establishment Clause attack, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), and it affirmatively invited such exemptions in *Smith*, 494 U.S. at 890. The City cannot distinguish *Amos*; the case is not even cited in the Argument section of its brief. City Br. at 11-49.

The City's argument confuses the advancement of religious liberty with the advancement of religion. RFRA does not require government to subsidize religion, benefit religion, or make religion in any way better off than it would be if government had done nothing; it requires only that religious conduct sometimes be left unregulated. RFRA is triggered only when government imposes a "substantial burden" on a religious practice, 42 U.S.C. §2000bb-1(b) (1994), and it requires only that government justify the burden or refrain from imposing it. Failing to burden religion is no establishment; government does not establish a religion by leaving it alone.

> [T]he Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.

Board of Educ. v. Grumet, 114 S.Ct. 2481, 2492 (1994).

> It is well established, too, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."

Amos, 483 U.S. at 334, quoting *Walz v. Tax Comm'n*, 397 U.S.

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[15] Americans United for Separation of Church and State, the American Civil Liberties Union, People for the American Way, the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League are all members of the Coalition for Free Exercise of Religion, and have all joined in the Coalition's amicus brief in support of Respondents.

664, 673 (1970). Thus, RFRA does not establish religion by requiring exemptions in circumstances where the Free Exercise Clause would not require such exemptions of its own force.

Amos and similar decisions necessarily reject each of the City's Establishment Clause arguments. Exempting religious exercise from burdensome regulation has the secular purpose and effect of protecting liberty. There is no implied endorsement; a decision to protect religious liberty implies no view about the value of religion in general or of any religion in particular. The avoidance of human suffering, and deference to beliefs that are usually far more important to the individual than to the state, are wholly adequate secular reasons for protecting religious liberty. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313 (1996). Regulatory burdens discourage religious exercise, but exemptions neither encourage religion nor discourage it; they are substantively neutral. *Lukumi*, 508 U.S. at 559-63 (Souter, J., concurring). By holding that the Constitution does not require religious exemptions, but that legislatures can enact them, this Court has in effect held that legislatures may choose either formal or substantive neutrality toward religion. Congress has chosen substantive neutrality. This is a form of neutrality entirely consistent with the Establishment Clause.

We have already discussed, *supra* at 35-36, the City's suggestion that exemptions for particular religious practices would be permissible but that RFRA's generally applicable standard for exemptions is not. Not only did Congress expressly find that specific exemptions are unworkable, but the City's whole argument is backwards. It guarantees chronic political battles between churches and other interest groups for individual exemptions, and it guarantees discrimination against the faiths that cannot win such battles. Generality is an Establishment Clause virtue, not a vice. *See Board of Educ. v. Grumet*, 114 S.Ct. 2481, 2491-93 (1994). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Congress thus acted on the highest Establishment Clause principles when it accepted the lead House sponsor's plea that it not succumb

to the temptation to pick and choose among the

> religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular . . .

1992 House Hearings, supra note 1, at 124 (Rep. Solarz).

Congress did not put this point in constitutional terms, but it could have: RFRA is in fact a law to enforce the Establishment Clause. RFRA will reduce the inevitable discrimination among religious practices that would result from leaving the problem of regulatory burdens on religion wholly to the political process.

The City's entanglement argument is a figment of its own imagination. The City need not keep files on the religious practices of its population; it need only respond when the need for exemption is brought to its attention. It can grant such exemptions administratively, by prosecutorial discretion, or by amending the burdensome ordinance. The City appears to concede that exemptions granted by state law and "narrowly tailored" federal exemptions are permissible, City Br. 45, 47, but this is inconsistent with its argument. Whether exemptions are granted under RFRA or individually, whether granted by federal, state, or local law, and whether granted judicially, administratively, or legislatively, any exemption requires some government official to satisfy himself that the claimed religious practice is sufficiently sincere and important to justify an exemption. If such determinations violated the Establishment Clause, narrow exemptions and state-law exemptions would violate the Clause equally with RFRA. They do not, and RFRA doesn't either.

V. The Enforcement Power Is Part of the Genius of Separation of Powers.

Separation of powers is not an end in itself; it is an essential means "to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). It is "necessary to control the abuses of government." *The Federalist* No. 51 at 322 (Madison) (Clinton Rossiter ed. 1961). Our Constitution is designed to protect liberty and limit abuse of power; it is biased in favor of liberty.

If all three branches of government have independent power to protect liberty, the odds are increased that at least one branch will do so. If all three branches must at least acquiesce in

suppression, liberty is less likely to be suppressed. In short, the more independent repositories of power to protect liberty, the safer liberty will be. This is the source of the ratchet effect of §5: the fact that Congress can expand but not contract liberty is a function of giving all three branches power to protect liberty.

Congress in 1866 faced a particularly acute case of the inability to trust any government agency with our liberties. Who could be trusted to enforce the rights of freed slaves in particular, and the rights of all citizens against state governments in general? Certainly not state governments, especially in the south; they had been the source of the problem. Not the President, who had vetoed the Civil Rights Act and opposed the whole Congressional program of Reconstruction. Not the judges, who were appointed by the President and who had decided *Dred Scott*. Not even Congress itself: Congress feared that when the seceded states were readmitted to Congress, a majority of southerners and northern Democrats would repeal all the civil rights bills. Cong. Globe, 39th Cong., 1st Sess. 168 (Rep. Howe); *id.* at 1095 (Rep. Hotchkiss); *id.* at 2459 (Rep. Stevens); *id.* at 2462 (Rep. Garfield); *id.* at 2540 (Rep. Farnsworth). It was essential to secure the new rights before the southern states were readmitted.

The Congressional response was to create as many enforcement mechanisms as possible. Section 1 of the Fourteenth Amendment is self-executing; it created judicially enforceable rights beyond the reach of future Congresses to repeal. Section 5 conferred independent power to enforce the Amendment "by appropriate legislation." Action under §5 would be vulnerable to future Congresses, but not so vulnerable to judicial neglect. If the judiciary gave narrow or hostile interpretations, Congress could respond with more specific legislation.

If the judges acted vigorously under §1, *or* if Congress acted vigorously under §5, the new rights would be safe. But if neither branch enforced the new rights, the Amendment would be a failure. This was not just a theoretical risk. "[F]or many years after Reconstruction, the Fourteenth Amendment was almost a dead letter as far as the civil rights of Negroes was concerned." *United States v. Price*, 383 U.S. 787, 801 n.9 (1966). Multiple authorities to enforce the Amendment could improve the odds but not could ensure success.

Each branch brings different strengths to the task of protecting liberty. The judiciary's insulation from the normal political processes, and its obligation to consider every case brought before it, are essential virtues in protecting religious minorities. But in the difficult balancing of interests required by some free exercise cases, this Court felt the need for a majoritarian voice. *Smith*, 494 U.S. at 890. By creating judicially enforceable statutory rights, Congress has called on powers of the judiciary that the Court was unwilling to invoke on its own. Because the rights created are statutory, Congress can retain a voice that it could not have retained if the Court had acted alone. By legislating generally, for all religions, instead of case-by-case for particular religions, Congress has greatly reduced the danger that legislative bodies will overlook the needs of small or unpopular faiths. If Congress and the judiciary cooperate in this way, then the Court's fears need not come to pass; the oppression of small faiths need not be an "unavoidable consequence of democratic government." *Id.*

CONCLUSION

The judgment of the Court of Appeals should be affirmed, and the case should be remanded for trial of plaintiff's claim under the Religious Freedom Restoration Act.

Respectfully submitted,

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